

FILED BY CLERK

JUL 29 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0115-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
PETER MASSINGA,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20052209

Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Peter Massinga

Douglas
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Peter Massinga petitions this court for review of the trial court's denial of his successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb this ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Massinga was convicted after a jury trial of second-degree murder, attempted first-degree murder, and three counts of aggravated assault and was sentenced to a combination of consecutive and concurrent prison terms totaling thirty-four years. We affirmed his convictions and sentences on appeal. *State v. Massinga*, No. 2 CA-CR 2007-0083 (memorandum decision filed Sept. 15, 2008). Massinga then sought post-conviction relief pursuant to Rule 32, and appointed counsel notified the trial court that he could find no arguable basis for relief. *See* Ariz. R. Crim. P. 32.4(c). Massinga then filed a supplemental petition arguing that application of the recently amended self-defense statute during his trial violated the prohibition against ex-post facto legislation and that his counsel had been ineffective by seeking application of the amended statute. After the trial court summarily dismissed that petition and denied his motion for rehearing, Massinga sought review in this court, and we denied relief. *State v. Massinga*, No. 2 CA-CR 2009-0305-PR (memorandum decision filed Mar. 25, 2010).

¶3 Massinga filed a second petition for post-conviction relief, urging that his trial counsel's decision to seek application of the amended self-defense statute was a "conflict of interest" resulting in deficient performance, that trial counsel had been ineffective because he had not adequately investigated Massinga's case and failed to present evidence relevant to Massinga's self-defense claim, and had not argued Massinga's conduct constituted manslaughter instead of second-degree murder. He also claimed the trial court erred by failing to give an instruction on reckless manslaughter. Massinga asserted his claims should not be precluded because he had not previously claimed counsel had a conflict of interest and, in any event, the court had discretion to consider the merits of his claims based on the "exceptional circumstances" presented—essentially that his claims were meritorious. The court summarily dismissed Massinga's

position, finding his claims precluded because they had previously been adjudicated on their merits or should have been raised in Massinga's previous Rule 32 proceeding or his appeal. *See* Ariz. R. Crim. P. 32.2(a)(2), (3).

¶4 Massinga reurges the same claims on review, asserting that preclusion does not apply to his first claim of ineffective assistance of counsel because it, unlike the claim raised in his first petition for post-conviction relief, is based on his counsel's conflict of interest and has therefore not been fully adjudicated on the merits. But even assuming Massinga's attempt to base his ineffective assistance of counsel claim on a purported conflict of interest¹ changes the claim's character so as to avoid preclusion under Rule 32.2(a)(2), the claim is still precluded pursuant to Rule 32.2(a)(3) because Massinga could have raised it in his first Rule 32 proceeding and failed to do so.

¶5 The remainder of Massinga's claims also could have been raised on direct appeal or in his previous Rule 32 proceeding. He nonetheless asserts they are not precluded, relying on the comment to Rule 24.2, Ariz. R. Crim. P., which states that subsection (b) of that rule, permitting trial courts to deny any motion to vacate judgment "on the grounds that the matter has already been decided," is not intended to have "absolute preclusive effect." But Rule 24.2 applies to motions to vacate judgment made within sixty days of judgment and prior to an appeal. Ariz. R. Crim. P. 24.2(a). It has no application to a proceeding under Rule 32, wherein a defendant "shall be precluded" by

¹As we understand his argument, Massinga asserts his counsel had a "conflict of interest" because he undertook a legal strategy Massinga does not agree with. That, of course, does not constitute a conflict of interest. *See* ER 1.7, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42 (conflict exists if representation "of one client will be directly adverse to another client" or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client or third person or by a personal interest of the lawyer"); *State v. Martinez-Serna*, 166 Ariz. 423, 425, 803 P.2d 416, 418 (1990).

Rule 32.2(a) from raising, inter alia, previously adjudicated or waived claims. Massinga's reliance on Rule 31.20, Ariz. R. Crim. P., is similarly unavailing. That rule allows this court to "suspend the requirements of any section of Rule 31," but, again, has no application to Rule 32. In any event, even assuming we had authority to "suspend" the preclusion provisions of Rule 32.2, Massinga provides no reason compelling us to do so.

¶6 Because the trial court did not err in summarily dismissing Massinga's successive petition for post-conviction relief, although we grant review, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge